IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4187 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

@

YASHVANTKUMAR VITHALDAS SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 4187 of 2002

MR ASHISH M DAGLI for Petitioner No. 1

MS MANISHA LAVKUMAR APP for Respondent No. 1

MR MOHANBHAI S. DESAI for Respondent No. 2

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 06/08/2002

ORAL JUDGEMENT

1. Rule. Ms. Manisha Lavkumar, learned APP appears and waives the service of notice of rule on behalf of

respondent No.1 - State of Gujarat whereas Mr. M.S. Desai, learned advocate appears and waives the service of notice of rule on behalf of respondent No.2.

2. In this petition which is filed under section 482 of the Code of Criminal Procedure ('the Code' for short), petitioner who is the original accused and against whom criminal complaint came to be filed for the alleged offence u/s. 138 of the Negotiable Instruments Act ('the Act' for short) and who has been convicted by the learned Metropolitan Magistrate (Court No.3), Ahmedabad and who has filed Criminal Appeal No.22 of 2001, has prayed to quash and set aside the order dated 4.10.2001 passed in Criminal Appeal No.22 of 2001 by the learned Additional City Sessions Judge (Court No.10), Ahmedabad by which the Criminal Appeal No.22 of 2001 has been dismissed for non-removal of office objections.

3. The petitioner herein is the accused and respondent No.2 is the complainant.

4. Respondent No.2 has filed criminal complaints against the petitioner for commission of alleged offence u/s. 138 of the Act. The said cases were registered as Criminal Case Nos.515 of 2000 and 516 of 2000 with the learned Metropolitan Magistrate (Court No.3), Ahmedabad. At the conclusion of the trial, the petitioner was convicted for the said offence.

5. Aggrieved thereby the petitioner has preferred Criminal Appeal No.90 of 2000 before the City Sessions Court, Ahmedabad. As there were two cheques, two cases were filed and the petitioner was convicted in both the cases. However, evidence was led before the trial court in one case and judgment was also common. Therefore, one criminal appeal being Criminal Appeal No. 90 of 2000 was preferred before the City Sessions Court. The Appeal was admitted and the petitioner was granted bail during the pendency of the appeal. However, during the course of the hearing, the City Sessions Court came to the conclusion that separate appeals are required to be filed as there were two cheques and two Criminal Cases.

6. Accordingly, the petitioner filed another appeal being Criminal Appeal No. 22 of 2001 alongwith application for condonation of delay. In the subsequent appeal being Criminal Appeal No.22 of 2001 notice was issued to the State and in view of the said order the petitioner had to supply copy of the Appeal Memo. But by bonafide mistake it appears that the same was not supplied as State Government had already appeared in

another case, i.e., Criminal Appeal No. 90 of 2000. Therefore, Criminal Appeal No.22 of 2001 came to be dismissed for want of prosecution. The said fact was not in the notice either of the learned Additional City Sessions Judge or of the petitioner.

7. Since dismissal of Criminal Appeal No.22 of 2001 was not within the knowledge of the learned Additional City Sessions Judge through inadvertence both the appeals were heard together and after considering the evidence and the order of conviction, the learned Additional City Sessions Judge was pleased to quash and set aside the order of conviction recorded in both the Criminal Cases being Criminal Appeal Nos.515 of 2000 and 516 of 2000 and the petitioner was acquitted in both the cases.

8. It appears that after the said order of acquittal was passed it came to the notice of the learned Additional City Sessions Judge that at an earlier point of time Criminal Appeal No.22 of 2001 was dismissed for want of prosecution and therefore it is clarified that the order passed by her on 14.12.2001 shall be considered as if it is passed in Criminal Appeal No.90 of 2000 only and not in Criminal Appeal No.22 of 2001 also.

9. The petitioner thereafter preferred Criminal Revision Application before this Court under Section 397 and 401 of the Code which came to be dismissed as the appeal is dismissed for want of prosecution which is not a final order and hence revision application would not lie. The petitioner has therefore preferred this Criminal Misc. Application under section 482 of the Code before this Court.

10. I have heard Mr. A.M. Dagli, learned advocate for the petitioner, Ms. Manisha Lavkumar, learned APP for respondent No.1 and Mr. Mohanbhai Desai, learned advocate for respondent No.2. I have also considered the averments made in the memo of the petition, grounds set out therein and the impugned order dated 4.10.2001 recorded in Criminal Appeal No.22 of 2001 recorded by the learned Additional City Sessions Judge (Court No.10), Ahmedabad by which the appeal came to be dismissed for want of prosecution and also the subsequent order dated 14.12.2001 by which it is clarified that the operative part of the order is in respect of Criminal Appeal No. 90 of 2000 which is arising out of Criminal Case No.516 of 2000 only and by the said order the judgment and order dated 20.11.2000 passed by the learned Metropolitan Magistrate (Court No.3) Ahmedabad came to be quashed and set aside whereas the said judgment was not made

applicable to Criminal Appeal No.22 of 2001 which is arising out of Criminal case No.515 of 2000.

11. There is no manner of doubt that the present petitioner was tried for commission of the alleged offence under section 138 of the Act by the learned Metropolitan Magistrate (Court No.3), Ahmedabad in Criminal Case Nos.515 of 2000 and 516 of 2000. He came to be convicted for the said offence. Aggrieved thereby the petitioner had initially preferred Criminal Appeal No.90 of 2000. However, subsequently as two cheques were issued and two criminal cases were tried, he preferred another Appeal being Criminal Appeal No.22 of 2001. The learned Additional City Sessions Judge (Court No.10) Ahmedabad has heard both the appeals and by order dated 14.12.2001 allowed both the appeals but later on clarified that the Criminal Appeal No.90 of 2000 arising out of Criminal Case No.516 of 2000 is allowed and thereby the order dated 20.11.2000 recorded by the learned Metropolitan Magistrate (Court No.3), Ahmedabad in Criminal Case No.516 of 2000 is quashed and set aside. It is further clarified that the judgment rendered in Criminal Appeal No.90 of 2000 is not made applicable to Criminal Appeal No.22 of 2001 which is arising out of Criminal Case No.515 of 2000 as Criminal Appeal No.22 of 2000 came to be dismissed for want of prosecution which fact was lost sight of the petitioner as well as by the Court while delivering the common judgment in Criminal Appeal Nos.90 of 2000 and 22 of 2001.

12. It may also be made clear that it is an admitted fact that there is no provision in the Code to file restoration application against the order of dismissal of the appeal for want of prosecution.

13. In this connection, it would be appropriate to refer to the judgment of this court in the case of Ayubbhai A. Shah v. State of Gujarat and others, 1994 (1) GLH 447 wherein this court has said that the court has inherent powers u/s. 482 of the Code to restore the proceedings of appeal which is dismissed for default.

14. Applying the principle laid down by this Court in the above referred to judgment to the facts of the present case, since Criminal Appeal No. 22 of 2001 came to be dismissed for default and as there is no provision in the Code for restoration of Criminal Appeal No.22 of 2001, which came to be dismissed for non-prosecution by the learned Additional City Sessions Judge, Ahmedabad, this Court can exercise inherent powers under section 482 of the Code for restoration of Criminal Appeal No.22 of

2001 before the learned Additional City Sessions Judge (Court No.10), Ahmedabad, for doing justice to the petitioner.

15. In view of this, the present petition deserves to be allowed by granting the prayer made in the petition.

16. For the foregoing reasons, the petition succeeds and accordingly it is allowed. Criminal Appeal No.22 of 2001 which was on the file of the learned Additional City Sessions Judge (Court No.10), Ahmedabad which came to be dismissed for default vide order dated 4.10.2001 is ordered to be restored to its original file. The learned Additional City Sessions Judge before whom Criminal Appeal No.22 of 2001 will be placed for hearing shall decide the same in accordance with law. Rule is made absolute.

(A.M. Kapadia, J.)

(karan)